SUPREME COURT, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-449

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION,
Petitioner,
v.
CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AND THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL R. BARNEY
LYNDA S. MOUNTS
WILLIAM H.H. HERRMANN, III
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1865

ROBERT W. BLANCHETTE
KENNETH P. KOLSON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

BETTY JO CHRISTIAN
(Counsel of Record)
EDWARD R. MACKIEWICZ
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae American Trucking Associations and the Association of American Railroads

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	3
I. THE DECISION OF THE COURT OF APPEALS PLACES A CLOUD OF UNCERTAINTY OVER INNUMERABLE SALE-OF-STOCK TRANSACTIONS	3
II. UNLESS THE UNCERTAINTY IS RESOLVED, THE ECONOMIC IMPACT OF THESE CONTINGENT WITHDRAWAL LIABILITIES COULD BE ENORMOUS	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988) 4

Dorn's Transp., Inc. v. Teamsters Pension Trust Fund, 787 F.2d 897 (3d Cir. 1986) 4

Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116 (1990) 7

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 4, 8

Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc., 857 F.2d 1107 (6th Cir. 1988) 4

STATUTES

29 U.S.C. § 1384 ..... 4, 5

29 U.S.C. § 1392(c) 4, 5

29 U.S.C. § 1399(c) 7

29 U.S.C. § 1399(c)(1)(C)(i)(I) 7

29 U.S.C. § 1399(c)(1)(C)(i)(II) 7

29 U.S.C. § 1405(b) 7

ACTS

Federal Aviation Administration Authorization Act of 1994, Title VI, Pub. L. No. 103-305, 108 Stat. 1569 (1994) 5

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C.) 5

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1988)) 2

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIAL — Page

Retirement Protection Act of 1993: Hearing on H.R. 3396 Before the House Comm. on Ways and Means, 103d Cong., 2d Sess. 170 (1994) (statement of Robert M. Spira, Director of Government Relations and Senior Corporate Counsel, Leaseway Transportation Corp. on behalf of the Multiemployer Pension Plan Solvency Coalition) .. 6

MISCELLANEOUS

PBGC Op. Ltr. 85-15, 1985 PBGC LEXIS 18 (May 31, 1985) 4
PBGC *1990 Annual Report* (1991) 6
PBGC *1992 Annual Report* (1993) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-449

SANTA FE PACIFIC CORPORATION,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AND THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interest of the trucking industry.[1] That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers. ATA

---

[1] Petitioner and Respondent have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

regularly advocates the trucking industry's interests before this Court and other courts.

The Association of American Railroads ("AAR") is a voluntary, not-for-profit incorporated trade association of the Nation's railroads. AAR's members operate approximately 75 percent of the line haul mileage, employ approximately 89 percent of the workers, and produce approximately 91 percent of the freight revenues of all railroads in the United States. Each of AAR's members is an interstate carrier by rail subject to the jurisdiction of the Interstate Commerce Commission. On matters of common concern, AAR represents its members before courts, agencies, and the Congress.

A number of motor carrier members of ATA contribute to multiemployer pension plans (including the Central States, Southeast and Southwest Areas Pension Fund ("Central States Fund")). Some members of the AAR have or had trucking subsidiaries that likewise contribute or contributed to multiemployer pension plans, including the Central States Fund. Such ATA and AAR members are thus subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Pub. L. No. 96-364, 94 Stat. 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1988)). MPPAA imposes liability on an employer for an allocable share of the plan's unfunded vested benefit liabilities upon the employer's withdrawal from the plan, even if the employer has complied with all of its obligations under the collective bargaining agreement.

Unless reversed, the decision of the court of appeals will have a dramatic impact on a number of ATA and AAR members. To the extent such members have sold or are in the process of selling their unionized motor carrier operations in sale-of-stock transactions, the decision below will have the effect of greatly increasing their contingent liabilities to multiemployer plans. In fact, the contingent liabilities that could be triggered should the

purchaser of the covered operations subsequently withdraw from the plan could amount to tens of millions of dollars for one company alone, as described more fully herein.

REASONS FOR GRANTING THE PETITION

If allowed to stand, the decision of the court of appeals could have a dramatic impact on the Nation's trucking industry. Particularly in this era of deregulation, the marketplace must be able to allocate responsibility for withdrawal liability between buyer and seller with some assurance that their allocation will be upheld. The decision below, which conflicts with the views of three other circuits as well as the federal government agency instrumental in crafting and enforcing MPPAA, casts a cloud of uncertainty over all sales of unionized operations.

The uncertainty surrounding this area could be expected to affect adversely not only contributing employers, but also multiemployer plans themselves. Unless the parties to sales transactions can resolve their respective responsibility for withdrawal liability with some degree of certainty, sales of unionized motor carrier operations are likely to be artificially depressed. In addition, the potential for exposure to contingent liabilities running in the tens of millions of dollars could lead to employer reorganizations or liquidations. Such a trend would cause immediate harm to the industry and ultimate harm to multiemployer plans resulting from the loss of contributing employers. Therefore, the petition for certiorari should be granted, and the decision of the court of appeals should be reversed.

I. THE DECISION OF THE COURT OF APPEALS PLACES A CLOUD OF UNCERTAINTY OVER INNUMERABLE SALE-OF-STOCK TRANSACTIONS

The decision below upsets settled expectations. Until now, it was understood that the sale of covered operations that took the form of a sale of stock would not in and of

itself create a contingent liability for the seller that would be triggered if the purchasing employer later withdrew from the plan. Only "sham" transactions—where a "principal purpose" was to "evade or avoid" withdrawal liability—could lead to the imposition of withdrawal liability on the seller. ERISA § 4212(c), 29 U.S.C. § 1392(c).

The Third and Sixth Circuits have both held that a transaction does not run afoul of § 4212(c) just because it was intentionally structured as a sale of stock. *Dorn's Transp. Inc. v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986); *Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988). The Ninth Circuit has also construed § 4212 narrowly, although in a different factual context. *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). And the Pension Benefit Guaranty Corporation ("PBGC"), which was instrumental in crafting and is responsible for enforcing MPPAA,[2] has taken the position that structuring a sale for the sole purpose of avoiding withdrawal liability does not by itself violate § 4212(c). PBGC Op. Ltr. 85-15, 1985 PBGC LEXIS 18 (May 31, 1985). In other words, a sale could be deliberately *structured* for the purpose of avoiding withdrawal liability, so long as the purpose of the *sale* was legitimate.

The Seventh Circuit in the decision below held otherwise. Its decision thus calls into question all stock sale transactions involving the sale of unionized motor carrier operations that contributed to multiemployer pension plans. Moreover, the decision also calls into question all sales transactions that were structured to take advantage of MPPAA's other "safe harbor"—§ 4204 asset sales. 29 U.S.C. § 1384. Under this provision, asset sales that are structured in accordance with the statute do not result

---

[2] *See generally Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720-22 (1984).

in the imposition of withdrawal liability on the seller unless the purchaser withdraws within five years of the sale and fails to pay the liability assessed against it. Under the Seventh Circuit's reasoning, transactions deliberately structured to comply with § 4204 so as to minimize the risk of withdrawal liability could also be deemed to violate § 4212(c).

The number of such transactions that could possibly be called into question is countless. The decade of the 1980's saw a significant "shake out" of the trucking industry as a result of the deregulation of interstate trucking in 1980. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C.). Since at least 1985 when PBGC issued its opinion letter, these transactions were entered into with the understanding that, as long as the transaction itself was not a sham, then choosing the *form* that the sale would take with an eye to minimizing the seller's potential withdrawal liability would not, without more, run afoul of the MPPAA's "evade or avoid" provision.

Moreover, the decision below creates uncertainty in the planning of future sales. In view of the split in the circuits and the fact that many motor carriers operate in several circuits including those with conflicting rulings on this issue, the parties to such transactions will be unable to determine with any degree of certainty the amount of liabilities that are being transferred as part of the sale. The effect of this uncertainty on the industry will be exacerbated beginning next year when a "second wave" of sales of trucking operations may well begin in response to the deregulation of *intra*state trucking that has just been enacted by Congress. *See* Federal Aviation Administration Authorization Act of 1994, Title VI, Pub. L. No. 103-305, 108 Stat. 1569 (1994).

In summary, the decision of the court of appeals creates intolerable uncertainties surrounding sales of unionized motor carrier operations.

II. UNLESS THE UNCERTAINTY IS RESOLVED, THE ECONOMIC IMPACT OF THESE CONTINGENT WITHDRAWAL LIABILITIES COULD BE ENORMOUS

The potential withdrawal liability that may be assessed against selling employers could be crushing. For example, Leaseway Transportation Corp. is a trucking company with operations throughout the United States. It currently contributes to more than 40 multiemployer pension plans. In 1993, Leaseway's aggregate contingent liabilities to these plans were estimated to *exceed* its net worth of $50 million. *See Retirement Protection Act of 1993: Hearing on H.R. 3396 Before the House Comm. on Ways and Means,* 103d Cong., 2d Sess. 170, 173 (1994) (statement of Robert M. Spira, Director of Government Relations and Senior Corporate Counsel, Leaseway Transportation Corp. on behalf of the Multiemployer Pension Plan Solvency Coalition) ("Spira Testimony").

These contingent liabilities have grown ever larger as the unfunded vested benefit liabilities of multiemployer pension plans have increased over the past few years. According to recent congressional testimony, multiemployer pension plan underfunding has increased from $5 billion in 1990 to $11 billion in 1992. Spira Testimony at 172; *see also* Pension Benefit Guaranty Corporation, *1990 Annual Report* at 22 (1991) and *1992 Annual Report* at 10 (1993). Furthermore, according to its recent annual government filings, the unfunded vested benefits for the Central States Fund has increased by approximately $459 million or 32 percent from 1991 to 1992 alone. 1992 Annual Report on Form 5500 at B-8. And, as noted in the Petition, more than 10,000 employers contribute to the Central States Fund. Pet. at 20 n.7.

The example of Leaseway demonstrates that an employer's entire net worth could be at risk with the assessment of withdrawal liability. To be sure, withdrawal liability may be paid over time, but the annual payment

amount is determined separately from the gross amount of the liability and is based on the employer's contribution history.[3] An employer in Leaseway's situation could be facing an annual liability in the millions of dollars for as long as 20 years. *See* ERISA § 4219(c), 29 U.S.C. § 1399(c).

Buyers and sellers must be able to plan for a potential liability of this magnitude. But unless the circuit conflict is resolved, that will not be possible. As things stand, unionized motor carrier operations cannot be sold in the normal course of business in such a way as to resolve contingent withdrawal liabilities with any degree of certainty. The result is likely to be that sales of such unionized operations will be artificially depressed.

Worse yet, the uncertainty could compel employers with unionized motor carrier operations to withdraw from underfunded multiemployer pension plans and "resolve" their withdrawal liabilities through Chapter 11 reorganization or liquidation. The trucking industry has already suffered numerous motor carrier bankruptcies (*see generally Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)), and the threat of massive withdrawal liability could well exacerbate the trend. This trend would endanger the financial viability of multiemployer plans. The withdrawal liability assessed against employers undergoing liquidation or dissolution is automatically reduced by as much as 50 percent. ERISA § 4225(b), 29 U.S.C. § 1405(b). Of this amount, the plan is likely to recover only cents on the dollar. In addition, large numbers of

---

[3] The annual payment amount is the product of the employer's "contribution base" multiplied by its "contribution rate." The "contribution base" is the average annual number of contribution base units for the highest three consecutive plan years during the ten plan years preceding the year in which withdrawal occurs. 29 U.S.C. § 1399(c)(1)(C)(i)(I). The applicable "contribution rate" is the highest rate at which the employer was obligated to contribute during the ten year period ending with the plan year in which the withdrawal occurs. *Id.* § 1399(c)(1)(C)(i)(II).

withdrawals result in increased financial burdens on the remaining employers, thereby encouraging further withdrawals. *See generally R.A. Gray*, 467 U.S. at 722.

Thus, in the long run, uncertainty in this area harms multiemployer pension plans and their participants as well as contributing employers.

CONCLUSION

For the reasons stated above and for the reasons set forth in the Petition, this Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

DANIEL R. BARNEY
LYNDA S. MOUNTS
WILLIAM H.H. HERRMANN, III
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1865

ROBERT W. BLANCHETTE
KENNETH P. KOLSON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

October 12, 1994

BETTY JO CHRISTIAN
(Counsel of Record)
EDWARD R. MACKIEWICZ
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae American Trucking Associations and the Association of American Railroads